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ment in the offense. The owner of the property taken might by his conduct in employing a detective to entrap a person suspected of crime, destroy the element of want of consent to such taking and hence no crime would be committed."

An attempt to harmonize *State v. Braisted, supra,* with the case in hand would be unsuccessful unless there is a difference in the degree of guilt in the sale of liquor—contrary to law—to a person who does not intend to use it (of which the seller will probably know nothing) and a sale which is disposed of upon the spot. That would be taking away part of the penal effect of a penal statute. Under a liquor statute, the buyer is not guilty of a crime, at least legally, but the statute means that whoever violates it shall be held guilty under any circumstances. Comparing the cases farther we find a direct conflict of opinion as to what is the better public policy under the same circumstances. The Colorado decision seems to go without the letter of the law and excuses a crime which has been perpetrated upon the public by the defendant with at least constructive intent. Surely it is impossible to say that the public officer, by whom the purchase of liquor was proposed, aided such intent. The act and intent are there. It is a crime and legal acts of other persons, although morally questionable, are unworthy of legal cognizance for the purpose of mitigating that crime.

Crimes of this nature are difficult to detect and prove. If it were inadmissible to introduce such evidence, a dealer engaged in the illegal sale of liquor would rarely be apprehended and our laws would be winked at. Instead of putting an offender in fear of the law it would make him feel safe in violating it.

LIABILITY OF EMPLOYER FOR THE PERMISSIVE WRONGFUL USE OF HIS PREMISES BY HIS EMPLOYEES TO THE INJURY OF THIRD PERSONS.

In the case of *Hogle v. Franklin Mfg. Co., New York Law Journal,* Vol. 44, No. 27, the defendant permitted its employees, for a period covering several months, to throw bolts, nuts, and other small pieces of iron from the windows of its factory, upon the plaintiff's adjoining lot, during working hours. Plaintiff secured and took several of the missiles thus thrown to the

president of the defendant corporation and was assured that such action as was necessary would be taken to stop this dangerous practice. Plaintiff's lessor notified the general manager of the defendant corporation many times of the existence and the continuance of these trespasses which were so frequent and of such a nature as to become not only dangerous, but a nuisance as well, and asked that he see that such acts be abated.

Through the wantonness and disregard or malice of the defendant's employees, the plaintiff sustained a severe injury and brought this action upon the grounds of negligence and nuisance. The defendant corporation contended that there could be no recovery unless the jury should find, that these pieces of iron were thrown upon the plaintiff's premises as a necessary consequence of the work being carried on there, or as an incident to it, and also argued that its workmen were not acting within the scope of their employment while perpetrating these acts, and that therefore an action for negligence would not lie.

The lower court did not so hold in deciding the case and rendered a judgment of negligence against the master, which was later set aside by the trial justice on the ground, as above stated, that the acts were not committed by the servant while in the scope of his employment, or performing some act incident to it.

It seems that this point of law—the scope of employment—has been carried farther or construed more liberally than was originally intended. The courts are practically unanimous that the employee must be doing some act, in or incident to the employment to render the master liable, but the circumstances are so peculiar in this and parallel cases, that justice seems to be defeated, when the phrase, scope of employment, is permitted to have any bearing whatsoever, in determining a verdict.

As this case logically should be determined upon—the use of property—it is well for us to look at the general rule, which holds, "That no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbors to the use of their property, so that each in exercising his rights must do no act which causes injury to the other." *Booth v. Rome,* 140 N. Y., 267.

There is an ancient maxim, *sic utere tuo ut alienum non laedas,* which is the foundation of this well established rule, that no one

may make an unreasonable use of his own premises to the material injury of his neighbor, and if he does, the latter has a right of action, provided the enjoyment of life and property is materially lessened. *Campbell v. Seaman,* 63 N. Y., 568.

The master in this case, with a right to direct and control his servants and their methods of accomplishing his work, permitted them to continue in and about his premises, after having received notice, that wilful and malicious acts had and were being committed under color of his employment, and *Dinsmoor v. Wolber,* 85 Ill. App., 152, holds, that the master is liable for all injuries suffered by third parties through reason of such wrongful use of his property, whether such acts committed are wilful or only careless. "Wilful" is held to mean, "Such a gross want of care and regard for the rights of others as to imply a disregard of consequences of an injury inflicted." *Cleveland C. C. & St. L. R. R. Co. v. Cline,* 111 Ill. App., 416. "Careless" is defined as, "A failure to exercise such care as the circumstances require." *Norfolk Beet Sugar Co. v. Preuner,* 55 Neb., 656.

In deciding this case the court said, that had the action been brought on the single issue of nuisance it would have been sufficient in determining that the use made of the property constituted a nuisance that, in this case, the property was to the master's knowledge, being used as a means whereby dangerous trespasses were being habitually committed, to the extent of inflicting substantial injuries, and would therefore be such a use as would be held a nuisance. The defendant may be liable as trespassor, although negligence is not established. *Sullivan v. Dunham,* 161 N. Y., 290.

In examining whether or not this constituted a reasonable use of property, we find that if the act committed is of such a nature that injury may be inflicted upon person or property, it may become a nuisance as a matter of fact, but when the acts are such that the injury to person or property is the only natural consequence, it should be held a nuisance as a matter of law. *Melker v. City of New York,* 190 N. Y., 481.

In the case under discussion the master had received many notifications of the use to which his property was being put and

was well aware of the dangerous practice that was being carried on, and when he did not employ the diligence necessary and owing to the public to see that the windows were closed or to detect the guilty parties and dismiss them from his service, such disregard would be sufficient to imply a ratification of the acts of his employees. *Cobb Simon,* 119 Wis., 597. The court said that the retention of a servant in the employ of the master after notice to the principal of a tort committed by the servant, is evidence of the ratification of the act by the principal, but the information to the principal must, as it was in this case, be full and complete.

In his decision of this question, there can be no doubt that the trial judge erred in setting aside the verdict upon the ground, that as the acts of the defendant's workmen were not done within the scope of their employment, an action for negligence would not lie. The acts were sufficient, as found by the jury to exist, to charge the master with the negligent conduct of his business, or to have based the finding upon the wrongful use he permitted to be made of his property, which resulted in the maintenance of a nuisance, and as such the judgement of the Court of Appeals in so finding should be approved.

COMPULSORY CONSTRUCTION OF INDUSTRIAL SIDETRACKS.

The question of shipper's constitutional right to demand of a common carrier the construction of a spur track to his place of business has been variously treated in this country. Some of the states have provided for this matter by the enactment of statutes, others by making it subject to regulation by commissions, and one state has gone so far as to devote to it a section of its constitution. Where the legislatures have been silent the courts have, of necessity, laid down the law, and they, too, have disagreed. A recent decision bearing on this point is to be found in the case of the *Nothern Pacific Ry. Co. vs R. R. Commission,* in 108 Pac. (Wash.), 938.

In this case a shipper, operating a sawmill at a point about midway between two recognized stopping places and at some distance from the main line of the railroad, petitioned the Railroad Commission to issue an order requiring the construction of